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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ROSE HILLS MEMORIAL PARK ASSOCIATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Claims

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PETITIONER'S REPLY BRIEF

JOHN T. SAPIENZA
MICHAEL BOUDIN
THEODORE L. GARRETT
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

AUSTIN H. PECK, JR.
M. ROGUE HEMLEY
WILLIAM A. LONG
LATHAM & WATKINS
555 South Flower Street
Los Angeles, California
90071

Attorneys for Petitioner
Rose Hills Memorial
Park Association

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TABLE OF CONTENTS

	Page
REPLY	1
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:

Commissioner v. *Brown*, 380 U.S. 563 (1965) 1, 7, 10-13
Commissioner v. *Kensico Cemetery*, 96 F.2d 594 (2d Cir. 1938) .....*passim*
Commissioner v. *Sunnen*, 333 U.S. 591 (1948) 6
Forest Lawn Memorial Park Ass'n, Inc., 45 B.T.A. 1091 (1941) .....*passim*
Forest Lawn Memorial Park Ass'n, Inc., 5 T.C.M. 738 (1946) .....*passim*
Knollwood Memorial Gardens v. *Commissioner*, 46 T.C. 764 (1966) 9
United States v. *Byrum*, 408 U.S. 125 (1972) 1, 6-7, 13
University Hill Foundation v. *Commissioner*, 446 F.2d 701 (9th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972) 12

STATUTES:

Internal Revenue Code of 1954, Section 501(c)(13) ... 7
Revenue Act of 1950, 64 Stat. 906 12

MISCELLANEOUS:

1961-2 Cum. Bull. 118 9

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PETITIONER'S REPLY BRIEF

Petitioner has urged, in support of certiorari, that this case presents an important recurring issue involving a direct conflict between the court below and the Court of Appeals for the Second Circuit; that the lower court's decision departs from governing principles established by this Court in *Commissioner* v. *Brown*, 380 U.S. 563 (1965); and that the lower court has ignored *United States* v. *Byrum*, 408 U.S. 125 (1973), by overturning a long-established construction of the tax laws relied on by numerous exempt organi-

zations. Pet. 17-40. The Government's opposition provides no persuasive ground for denying certiorari. On the contrary, it is now even more evident that the present case involves a continuing question of major importance and the legal issues are ones plainly deserving of resolution in this Court.

1. The petition showed that the transaction involved in this case—the deferred payment, percentage contract for cemetery land acquisition—has been conventionally employed by non-profit cemeteries since before the turn of the century and this method has been used by many cemeteries besides Rose Hills. In employing this method, Rose Hills, like numerous other cemeteries, relied directly upon decisions of the Second Circuit, the Board of Tax Appeals, and the Tax Court which held that the transaction would not jeopardize the cemetery's exempt status.[1] On these premises it is apparent that the Court of Claims' decision here holding the transaction inconsistent with exempt status has widespread ramifications and the decision overturns a settled judicial construction of the cemetery exemption statute on which Rose Hills and many other exempt cemeteries have relied.

The Government does not dispute that the question presented is a recurring one. Indeed, it does not attempt to confine the legal arguments it urges to any particular facts but states them in general and unqualified terms. Gov. Opp. 16-19. Quite apparently, it

[1] The cases are *Commissioner* v. *Kensico Cemetery*, 96 F. 2d 594 (2d Cir. 1938); *Forest Lawn Memorial Park Ass'n, Inc.*, 45 B.T.A. 1091 (1941); *Forest Lawn Memorial Park Ass'n, Inc.*, 5 T.C.M. 738 (1946). The Commissioner, after initially refusing to acquiesce, acquiesced in the BTA decision in 1946 and maintained that acquiescence until 1960. See Pet. 7, 9.

agrees that the decision below establishes a general rule that the use of the deferred payment, percentage contract forfeits a cemetery's tax exemption, and the Commissioner will deal accordingly with the many other cemeteries which have entered such transactions, obligating themselves to continue payments pursuant to those contracts.

The implications of the Government's position are further sharpened by the brief *amicus curiae* filed on behalf of the American Cemetery Association. That brief notes that among the ACA's own membership are over 650 cemeteries of which two-thirds are nonprofit organizations scattered throughout the country. ACA Br. 2. It confirms that the transaction in issue here represents the "widely used and only feasible method by which nonprofit cemeteries can acquire land . . . ." *Id.* And it emphasizes that the holding of the lower court will thus enable the Commissioner to seek revocation of the exempt status of heretofore exempt cemeteries which have employed this method "and nearly all of them have." *Id.*[2]

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[2] Additionally, the *amicus curiae* brief shows that the position of these other cemeteries resembles that of Rose Hills not only in their use of the method but also in their reliance on existing law. After referring to *Konsico*, the *Forest Lawn* decisions, and the Commissioner's acquiescence, the *amicus curiae* brief continues:

> "The result has been that most nonprofit cemeteries have done exactly what Rose Hills did, they relied on what appeared to be a well established view of the law, recognized not only by state legislatures and responsible courts but by the Commissioner of Internal Revenue himself as an acceptable means of getting underway and operating the cemetery. The contracts which nonprofit cemeteries have entered into to acquire land are by their very nature long-term contracts, predicated on what was thought to be an established rule that such contracts were entirely consistent with exempt status." *Id.* at 4-5.

The decision below not only affects numerous cemeteries but its consequences will be extreme and disastrous for many of them. Rose Hills' exemption has been revoked retroactively to 1961 and the tax sought for the single year here in issue is almost a quarter of a million dollars. Pet. 10, 38. Other cemeteries which have relied on existing law in making such contracts will have their financial position similarly jeopardized and find themselves suddenly liable to large claims for back taxes. ACA Br. 2-3. As for cemeteries trying to establish themselves or to expand, they will find that the lower court's decision has foreclosed the basic means of achieving financing which is open to them given the practical constraints that eliminate ordinary methods of mortgage borrowing. Pet. 5; ACA Br. 3.

Although the Government does not question the recurring nature of the issue it does imply that Rose Hills may not have relied on the prior decisions, and presumably this response would be made to the asserted reliance of other cemeteries.[3] In view of the widespread use of this financing method by exempt cemeteries for many years and the Commissioner's published acquiescence in *Forest Lawn* continuing until 1960, it is hardly plausible for the Government to suggest that Rose Hills made its major acquisition of land in 1952 without knowledge of or reference to practice and decisions that assured its trustees that the transaction would not forfeit its tax exemption. In any event,

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[3] The Government's opposition speaks, for example, of Rose Hills' "alleged reliance on *Kensico* and *Forest Lawn*." Gov. Opp. 21. It also refers to "any reliance petitioner may have placed on *Kensico* and *Forest Lawn*" and to the extent that "petitioner may have relied upon the Commissioner's acquiescence, between 1946 and 1960, in *Forest Lawn* . . . ." *Id.* at 20 & n.5.

their reliance is plainly established by the record in this case.

In the evidentiary hearing before the trial commissioner, Government counsel examined R. L. McNitt, Jr., who was executive vice president of Rose Hills at the time it made its principal land acquisition in 1952. In response to questions Mr. McNitt stated that he had reviewed "the Kensico case and the Forest Lawn cases in detail" and knew of the Commissioner's acquiescence (Tr. 842), and he had satisfied himself that the deferred payment, percentage contract had been used historically by non-profit associations and was consonant with the cemetery's tax exemption. Tr. 843.[4] Mr. McNitt was then asked whether he had so advised the other trustees of Rose Hills and he replied: "Certainly I told them that I had satisfied myself in connection with my investigation of the problem, that this, as far as I was able to ascertain, was not only customary and usual, but had been approved by all the courts and even the Internal Revenue Service." Tr. 843-44.

The Government also implies that when Rose Hills made its acquisition it ought to have anticipated the Commissioner's eventual reversal of his position in light of intervening legal developments since 1946. Gov. Opp. 21. This is a remarkable suggestion in view of the fact that Rose Hills made its principal contract in 1952 and the Commissioner himself continued his acquiescence in *Forest Lawn* for eight more years until 1960. It is also notable that the four cases principally relied on by the Government in support of

[4] The position of other cemeteries which made such contracts cannot have been different. See p. 3, n.2, above.

its position were all decided between 1965 and 1967 and only one of them involved the exempt status of a non-profit cemetery. Gov. Opp. 10-13.

These circumstances vividly illustrate the good sense and fairness of this Court's recent admonition in *United States* v. *Byrum* that courts should not readily depart from longstanding constructions of the tax laws on which parties have reasonably relied. If alterations are needed, Congress can achieve them without the harsh or retroactive consequences that are likely to attend judicial revision. Congress has been more than ready to revise the tax laws relating to exempt organizations where it found abuses to exist, enacting major revisions in 1950 and in 1969, but it has not amended the cemetery exemption provision in any way. See Pet. 38-39.

The Government forbears from challenging *Byrum* directly but instead concludes its opposition with a quotation from *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948), designed to cast doubt on the permissibility of taxpayer reliance. Gov. Opp. 21-22. It is unnecessary to argue that *Byrum* as the most recent pronouncement takes precedence, because *Sunnen* was addressed to a quite different problem that has no significance here. In *Sunnen*, the Court refused to approve an expansive use of collateral estoppel which would have made a finding in the taxpayer's favor in one year conclusive in the next and opened the way to competitive or discriminatory advantages for the taxpayer vis-a-vis others who had not litigated their cases in the earlier years. 333 U.S. at 599.

The principle established in *Byrum* and invoked here has nothing to do with collateral estoppel nor does it provide one taxpayer with advantages denied

to the others. *Byrum,* emphasizing traditional rules of *stare decisis,* is designed to prevent heedless departures from prior judicial *construction of a tax statute* on which numerous taxpayers are bound to have relied. See 408 U.S. at 134-135. And plainly the longstanding construction of Section 501(c)(13) relied on by Rose Hills would, if sustained by this Court, apply equally to all similarly situated cemeteries and bestow no special advantage of any kind upon Rose Hills.

2. Since the question presented is plainly important and recurring, the only reason for denying certiorari would be that the proper legal result was so clearly reached by the court below as to make review here superfluous. Quite the contrary, the decision below involves a direct conflict with the decision of the Second Circuit in *Kensico* construing the same statutory provision in the same context, and it deviates from broader principles of tax law established by this Court in *Brown* and *Byrum.* It also disregards legislative history relied on by the trial commissioner and the petition in this case which demonstrates that the Court of Claims' conclusion is contrary to Congress' intent in framing the statute in question.[5]

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[5] The pertinent legislative history relates to the 1921 amendment by which Congress introduced the present statutory provision, now contained in Section 501(c)(13), exempting cemeteries "no part of the net earnings of which inures" to any private shareholder or individual. Pet. 19-21. The congressional debates show that the quoted language was directed to preventing dividend payments and similar distributions of net earnings and was not intended to preclude payments made for the conventional necessities of cemetery operations; and the acquisition of land for cemetery expansion clearly falls within the latter category. *Id.* The Government's opposition has not refuted or sought to explain away this legislative history but has chosen instead to ignore it.

Kensico unquestionably represents the only circuit court decision directly in point since it is the only one involving a determination of the question whether a cemetery's use of the deferred payment, percentage contract is inconsistent with exemption under the statute. That case is in direct conflict with the decision below and the Government's opposition openly concedes that the present case "is at odds with the earlier decisions of the Second Circuit and the Board of Tax Appeals in *Commissioner* v. *Kensico, supra*" and *Forest Lawn*. Gov. Opp. 16. The Government's subsequent grudging attempt to develop factual distinctions between this case and *Kensico* ignores the general holding of that case (Pet. 18-19), and the factual distinctions it offers are themselves unpersuasive.[6]

The Commissioner's own checkered position on the legal issue belies the Government's present claim that the issue is a straightforward one readily resolved in its favor. The Commissioner himself continued to

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[6] For example, the Government suggests that in this case, unlike *Kensico*, the land was acquired by the sellers "shortly before the transfer" to the exempt organization. Gov. Opp. 21. In fact, some of the land was acquired as early as 1914 by a predecessor of the sellers' Bartolo Corporation and effective control of the vast bulk of the land involved was obtained by 1947 by Banslope, a corporation commonly controlled with Bartolo and ultimately merged into it. Pet. App. 23a-30a. Similarly, the Government contends that in this case, unlike *Kensico*, there was an absence of "arm's-length" bargaining. Gov. Opp. 20-21. However, the record shows that Rose Hills' trustees were faithful to their fiduciary duty to protect Rose Hills' interest by obtaining the land for a reasonable price and, in addition, the legal relevance of arm's-length bargaining is obscure where as here the record shows that the ultimate price arrived at was entirely reasonable and quite favorable to Rose Hills. Pet. 11-12, 30 n.26.

acquiesce in *Forest Lawn* until 1960 when he withdrew his acquiescence. Shortly thereafter, he asserted that the transaction would normally open the exempt organization to the charge of paying an unreasonably high price for the land, the excess amount thus inuring to the benefit of the sellers. 1961-2 C. B. 118, 120. This was also the basis given by the Commissioner in revoking Rose Hills' exemption in 1966. Pl. Ex. 128. It is only now—Rose Hills having established at trial that the price was not excessive—that the "retained equity" theory is advanced as a solution so clearly right that Rose Hills ought to have anticipated it many years before and further consideration of the issue is unnecessary.

Only one of the four cases principally relied on by the Government to support its view of the "current" state of the law actually concerned the exempt status of a cemetery utilizing the deferred payment, percentage land acquisition. That case, *Knollwood Memorial Gardens* v. *Commissioner,* 46 T.C. 764 (1966), involved an excessive price and the Tax Court emphasized that fact in reaching its results. Pet. 32 & n. 28. While the Government asserts that the other three cases it describes (Gov. Opp. 10-12) established general principles favorable to its position, the three circuit court decisions it cites require severe qualifications on this view: the very first of the three cited cases *(Sherwood)* explicitly distinguished *Kensico* as involving a non-profit exempt cemetery; the second *(Peterson)* relied expressly upon *Sherwood;* and the third *(Gardens of Faith)* was a one-paragraph statement containing no substantial discussion of the relevant legal issues (Gov. Opp. 12 n. 1). See Pet. 31-32.

Moreover, if the substantive law is to be drawn from cases not involving the exempt status of cemeteries engaging in the transaction in question, then surely it is this Court's relevant decisions rather than the lower court cases cited by the Government which must be consulted in determining whether a substantial legal question is presented. As the petition showed, this Court's decision in *Commissioner* v. *Brown* presents the closest analogy since it is the leading decision which characterizes, for tax purposes, a transfer to an exempt organization in which the purchase price was paid on a deferred basis from revenues generated by operating the business.

The Court in *Brown* considered in this context the very line of risk-shifting analysis—claimed by the Government to unmask a retained equity interest—that is the essence of the Government's opposition here and its justification for the decision below. Rejecting this line of analysis, the *Brown* decision sustained the transaction as a sale rather than a retained equity interest: it emphasized that its view conformed to normal usage, that the fairness of the price had been properly established, and that the Government's new approach "would have wide ramifications which we are not prepared to visit upon taxpayers, absent congressional guidance in this direction." 380 U.S. at 572-75.[7] In this case, also, the former owners of

[7] In considering the Government's analysis, which "purport[ed] to probe the economic realities of the transaction," the Court pointed out *inter alia* that the lower court had found "that the price paid was within reasonable limits based on the earnings and net worth of the company." 380 U.S. at 573. If an excessive price were indeed inevitable, the Court stated, then "it would not be an impossible task for the Commissioner to demonstrate the fact." *Id.*

Bartolo had sold their land to Rose Hills subject to deferred payments, the fairness of the price paid was established at trial, and the Government's new approach would overturn a long-settled construction of the tax laws.[8]

The Government attempts to distinguish *Brown* principally on the ground that it involved a fixed price, but the decisions of this and other courts establish beyond dispute that the use of percentage payments and indefinite periods is wholly consistent with a sales transaction. Pet. 29 & n.25. It is dubious, in fact, whether the transaction at issue in *Brown* involved a fixed price in any realistic sense. See 380 U.S. at 568-70, 586-87; Pet. 29 & n.24. In any case the decision in *Brown* did not purport to be limited by the particular design of the contract or method of computing the purchase price, but rather it stressed that the price was a reasonable one and rejected the Government's risk-shifting analysis outright.

The Government thus cannot sustain its assertion that *Brown* has "little" to do with the exemption question, and the circuit court decision it cites in this

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[8] The trial commissioner found that, as of the date of the transfer agreement in 1952, the Bartolo property transferred to Rose Hills had a present value of approximately $10 million and the projected payments by Rose Hills to the former Bartolo stockholders had a present value of approximately $7 million. App. 7a-8a, 51a. The court below did not dispute either of these findings which, under settled principles of valuation, plainly show that Rose Hills did not pay an excessive price for the property. Pet. 12 n.9, 28 n.23.

connection is not in point. Gov. Opp. 18 & n.3.[9] Its present position contrasts sharply with its statements made to this Court while *Brown* was still in issue when the Government willingly suggested that the *Kensico* case presented merely a different variation on the same basic transaction at issue in *Brown*. Pet. 27 n.22. It is not unfair to suggest that the Government's narrow reading of *Brown* is a consequence of the unfavorable outcome in that case, and petitioner here is entitled to the same undiluted application of the underlying principle in *Brown* which the Government would readily claim if the case had been decided in its favor.

In all events, as *Brown* is the prevailing law, its application to the type of transaction at issue in this case certainly raises a substantial and important question. Review is also supported by the more recent and converging doctrine of *Byrum* which, in a

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[9] The Government cites *University Hill Foundation* v. *Commissioner*, 446 F.2d 701 (9th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972), with a description that may be misunderstood as suggesting that the Government's analysis is appropriate in determining the exemption question even though it is not permissible in determining the capital gains question involved in *Brown*. What the Government fails to mention is that the ground of revocation in *University Hill* had nothing to do with the Government's claim in this case that a sale to an exempt organization on a deferred payment, percentage basis involves a retained equity interest by the sellers inconsistent with tax exempt status. *University Hill* turned on the question whether a "feeder" foundation, whose claim to exempt status rested solely on its transmission of the profits of the acquired businesses to an educational institution, was itself a foundation "operated exclusively for . . . . educational purposes" or was otherwise protected by the provisions of the Revenue Act of 1950 relating to feeder organizations. See 446 F.2d at 702, 705-706.

more general context, also emphasized the importance of *stare decisis* in construing the tax laws. Compare *Brown*, 380 U.S. at 474-75, with *Byrum*, 408 U.S. at 135. When these cases are considered in conjunction with *Kensico*, *Forest Lawn*, and the Commissioner's own longstanding acquiescence, then we believe that it is apparent that the legal issues presented are deserving of review in this Court.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

JOHN T. SAPIENZA
MICHAEL BOUDIN
THEODORE L. GARRETT
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

AUSTIN H. PECK, JR.
M. ROGUE HEMLEY
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LATHAM & WATKINS
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